SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 317.

THE DAY-BRITE LIGHTING, INC.,
Appellant,

vs.

STATE OF MISSOURI.

Appeal from the Supreme Court of the State of Missouri.

APPELLANT'S REPLY.

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Cases Cited.

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I.

THE APPELLEE'S BRIEF.

The State of Missouri has filed its Statement, Brief and Argument in reply to Appellant's Statement, Brief and Argument. The issues should now be joined, and the points in controversy clearly delineated. A careful analysis of

the Appellee's brief shows unfortunately that such is not the case. A careful examination of its brief shows it has failed to answer appellant's arguments in three respects. These three ways are, according to the logicians, (a) the fallacy of petitio principii, or begging the question; (b) the fallacy of ignoratio elenchi (sophistry, sophism, fallacia consequentia, etc.), or disregarding the question; and (c) the fallacy of non-contradiction, or failing to answer the question.

The first two of these fallacies occur in appellee's attempt to answer some of appellant's contentions. The third is occasioned by its total failure to answer other of appellant's contentions. Perhaps the best way to analyze what appellee has replied is to place the two briefs side by side and go through them point by point, pro and con.

A. AN ANALYSIS OF THE TWO ARGUMENTS.

1. Appellant's Brief (p. 13).

B. The statute violates "The Due Process Clause."

1. Appellant is deprived of tangible property by this statute.

Appellant argued it was deprived of a substantial amount of money forced to be paid to employees for work not performed. This is true on every election day.

Appellee's Brief (p. 15).

Part H, Appellee's Brief, baldly states the questioned statute is not deprivation of property without due process of law. **Nowhere in the brief** does appellee deny appellant's contention in B-1 above. The majority opinion of the Missouri Supreme Court admitted it (R. 40).

2. Appellant's Brief (p. 15).

B-2. Appellant is deprived of its property right to contract.

Appellant is deprived of property right to make a reasonable contract without due process.

Appellee's Brief (p. 45).

Appellee argues that freedom of (to) contract is a qualified right. It cites West Hotel Company case in part as follows: "Liberty implies the absence of arbitrary restraint, not immunity from **reasonable** regulation . . ." (p. 17). (Emphasis supplied.)

Here we have a splendid example of begging the question. Appellant raised again and again the remonstrance that it was deprived of the right to make a **reasonable** contract—that the statute imposed "arbitrary restraint" on its property right to contract reasonably. The appellee argues legislatures have the right to restrict freedom of contract under certain circumstance, e. g., "injurious practices in their internal **commercial** and **business** affairs"; "to suppress **business** and **industrial** conditions they regard as offensive to the public welfare" (p. 16), as well as various types of contracts involving labor legislation.

By no single syllable does appellee argue that the restraint imposed by this law is reasonable, nor does appellee argue that the contract as entered into between appellant and Grotemeyer was unreasonable. Its argument simply states that under certain circumstances the State has the right to impair the obligation of contracts as long as such impairment is to the promotion of "the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity" (p. 21). Therefore, concludes appellee, the section in question represents a legitimate exercise of the police power

of the State of Missouri. Sophistry of this type can prove nothing.

3. Appellant's Brief (p. 15).

B-3. Appellant is deprived of the fruits of its contract.

Appellant here argued that the employer had as its property a right, secured by contract, to an hour's work for each hour it paid its employees and called attention to the Union contract between Grotemeyer's Union and appellant. The decision of the Missouri court deprives this appellant of that property right without due process.

Appellee's brief contains no contradiction of this argument.

4. Appellant's Brief (p. 16).

B-4. Private property is confiscated to another's enrichment.

Here appellant argues that the statute takes private property from one citizen and gives it to another citizen without due process. In effect, the law demands the private maintenance of a public enterprise. No reason can exist for forcing one portion of the electorate to pay another portion of the electorate for exercising a right equally vital to both. It is particularly bad when, as here, the employer has no means of ascertaining whether the employee is entitled to vote or whether he in fact does vote.

Appellee's Brief (p. 19).

Appellee argues that the legislature has the power to levy taxes to spend the money for a public purpose and that the tax burden is not equally distributed upon all persons. Appellee evidently does not recall that an amendment to the Constitution of the United States had to be passed before an income tax could be held constitutional.

It further argues that the furnishing of free textbooks to school children has been upheld. Would appellee contend that employer's could be constitutionally forced to buy free textbooks for the school children of employees or that all farmers could be forced to pay for free school lunches for the children of all cab drivers? Further, the argument of the appellee concerns those cases in which the state has collected the money and made the disbursements, not when it has forced one group of the electorate to pay directly to another portion of the electorate.

The appellee does then proceed to cite two cases (pp. 20-1) involving labor legislation. It is interesting to note that the citation from Carmichael v. Southern Coke & Coal Co., 301 U. S. 495, starts out: "The end being legitimate . . . ," and the Mountain Timber Co. v. State of Washington, 243 U. S. 219, contains in the state's quotation the following language: ". . . such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people . . . ," as well as the quotation concerning the promotion of health, peace, etc., previously set out above.

The courts have felt and properly felt that the economic welfare of the country demanded certain safeguards be erected for the promotion of health, safety, peace, education, morals, and good order in the industrial field, but as pointed out by the appellant in its brief, the legislation here is not and cannot be labor legislation. It was passed to prevent corrupt practices at elections (Appellant's Brief, 36).

Appellee recognizes this on page 18 of its brief when it states that the section is "designed to provide for free and open elections." Appellee in a purported answer to appellant's argument under this point cites Santiago v. People of Puerto Rico, 154 Fed. (2d) 811, illustrating the right of a free people to participate in political affairs. Of course, none of the argument advanced has anything to do

with the taking of private property to another's enrichment.'

The laws involving labor legislation and the other arguments advanced clearly show appellee has fallen into the fallacy of believing the point can be proved by an argument which proves something not at issue. We are not here debating the wisdom of labor legislation nor the right of a free people to participate in political affairs. We are solely concerned on this point with the constitutionality of taking property by state statute from one group of voters without due process and giving it to another group of voters.

5. Appellant's Brief (p. 19).

B-5. The State usurps power in derogation of appellant's vested rights.

Under the Constitution of the United States the Federal Government has delegated to the states the authority to determine the time, place and manner of holding national elections. Forcing an employer to pay an employee for services not rendered (and in contravention of his union contract) for time said employee absents himself from his work on election day (whether he votes or not, or whether he is entitled to vote or not) has no relation to the time, place or manner of holding elections. When the state usurps the power to inflict upon appellant a fine in the criminal prosecution for violating the provisions of a statute embodying such unauthorized encroachment in a national election, the appellant is being deprived of property without due process in contravention of the Fourteenth Amendment.

Appellee's Brief (p. 7).

Appellee's only answer to the above contention is that appellant's argument "seems to imply" that this statute

is violative of Article One, Sections 2 and 4 of the United States Constitution, which is raising a Federal question for the first time on appeal and hence the Federal question is raised too late. That argument would be sound if that were appellant's argument. Appellant's argument, however, is to the effect that the state's violation of those sections results in depriving appellant of property without due process; that the states usurpation of power is the cause and not the effect. The effect is the deprivation of property which has certainly been raised throughout appellant's brief. So appellant's argument on this point is entirely unanswered by the appellee.

6. Appellant's Brief (p. 22).

D-6. Police Power sicklied o'er with the pale cast of thought.

The Missouri court admitted the statute was a denial of due process, but justified it by an unprecedented extension of the police power. Nowhere did the Missouri court distinguish between a guarantee of the right to vote and a guarantee of the right to be paid for absence from work on election day. (It may be noted here that this question has not been answered by appellee in its brief and its existence has been entirely ignored. Appellant submits that distinction must be made to adjudicate this matter properly. Otherwise there is an irreconcilable conflict.)

Appellant continues with its argument that the statute is not a reasonable exercise of the police power for several reasons. It is an extension of the police power into a field in which police power has never before been considered. It creates an immoral and an unprecedented classification of voters. Hourly paid workers are not more derelict in their duty of voting than other segments of the electorate. Everyone should have the right to vote, but no segment of the voters should receive pay for absenting themselves.

from work on election day. An unreasonable burden is cast upon the employer. The appellant did not even violate the law in question when the plain and usual meaning of the words contained therein are construed in their plain, everyday meaning. Hence the appellant was deprived of property without due process when it was convicted and had committed no crime. The statute is unreasonable because the time fixed thereby was not a reasonable or necessary time according to the prosecuting witness' own testimony.

This Court, in passing on the question, should follow its reasoning in West Coast Hotel Co. v. Parrish, 300 U. S. 379, when it examined legislation, previously held unconstitutional in Adkins v. Children's Hospital, 261 U. S. 525, in the light of the "economic conditions which have supervened (since this statute was passed in 1897 when the working day was 14 to 16 hours) and in the light of which the reasonableness of the exercise of the protective power of the State must be considered." Employer dominance no longer exists in the light of present economic conditions. There is no reasonable basis for the exercise of police power to justify appellant's deprivation of property without due process of law. Labor legislation has always been classified as such in the bill creating the legislation. This is not labor legislation.

Appellee's Brief (p. 10).

E. The enactment of Section 129.060, R. S. Mo. 1949, is a constitutional exercise of the police power of the State.

Appellee argues that the statute was passed by the State legislature to provide a means of insuring the largest possible vote. The exercise of the voting privilege is clothed with a public purpose. Other states have adopted similar legislation because they recognized the existence of the evil of the employer domination. In any consideration of the principle of the legitimate exercise of the police power,

the Legislature is free to do anything not forbidden by the State or Federal Constitutions. Except for these limitations, the power of the State Legislature is unlimited.

The Constitution of the State of Missouri provides elections shall be free and open and no power, civil or military, shall interfere with the free exercise of the right to vote. In keeping with this spirit the legislation in question was passed. This was a valid exercise of the police power. Nowhere throughout its amazing feat of begging the question does the appellee touch on the reasonableness of the legislation, the justification for the legislation, any precedent for such an extension of the police power which the appellee states is "the power inherent in every sovereignty to protct not only its very existence, but also the security of the **social order, the life and health of the citizens, the enjoyment of private and social life** and the **beneficial use of property**" (p. 11). (Emphasis supplied.)

The appellee, it is to be feared, has fallen into the fallacy wherein that which is to be proved is implicitly taken for granted. Appellant has attacked the exercise of the police power under the circumstances here present for a great many reasons. Appellee has answered none of them. It says the police power can be exercised under certain conditions. Therefore, it was properly exercised here. It again goes from major premise to conclusion without troubling itself over the all important minor premise as to whether those certain conditions are here present.

Appellant's Brief (p. 36).

C. The Statute Denies Equal Protection of the Laws.

The statute deals with corrupt practices in elections. All voters are in an equal position or "similarly situated." This statute forces one group of voters to subsidize another group of voters and does not even insure

that the group being subsidized actually vote or actually are voters. It merely subsidizes them for absence from their employment on any election day. This classification made by the statute is arbitrary, unreasonable and denies appellant equal protection of the laws.

Appellee's Brief (p. 13).

G. The section is not a denial of the equal protection of the law.

Employers as distinguished from employees do not constitute a class as within the constitutional prohibitions against class legislation. The statute applies to every employer and every employee in the State of Missouri. (This is not true. It applies only to employees who are voters.) The statute was enacted as a legislative answer to a serious evil—the domination of political life by employers. (Nowhere does appellee discuss, concede or deny the vastly different position of employees now and in 1897. It will be borne in mind that this case, under the doctrine in the West Coast Hotel Co. case, is to be examined in the light of present-day conditions and the economic conditions which have supervened since the passing of the legislation.) A law to escape the criticism made by appellant here must affect alike all persons in the same class and under similar conditions. (When it comes to voting, there is no class distinction as pointed out by appellant in the authorities cited on pages 38 and 39 of its brief.)

In support of its contention, appellee again cites cases concerned with labor legislation, not legislation to prevent corrupt practices in election. Appellee throughout speaks of economic classifications, which have no application here, and not a political classification. As far as this legislation is concerned, all voters are similarly situated. Appellee's argument is again a classic example of begging the question.

Appellant's Brief (p. 42).

D. The Statute Impairs the Obligation of Contracts.

There was a Union contract creating duties and obligations both on the part of the employer and the employee. Among other things, the employer was entitled to receive one hour's work for each hour's pay; no employee could hold the employer to the exact terms of the contract and refuse to comply with those terms himself. If the employee cannot do so, the State cannot pass a law effecting the same result.

The authorities hold the Government can regulate contracts reasonably calculated "to injuriously affect the public interest." No possible construction of the Union contract in question can show that it is "reasonably calculated" to injuriously affect the public interest. The employee's interest in government is as great as the employer's. It is not reasonable to say that an employee in the exercise of a moral civic duty and while exercising a legal right must do it at his employer's expense and to the impairment of his working agreement.

The purpose behind the prosecution here is to secure pay for Union employees for work not performed and services not rendered. A contract contains the provisions of all valid material statutes. This applies equally to both contracting parties. The provisions of this statute could be waived by the employee. When the contract was silent on the question, any right to receive pay for work not done was thereby waived. No statutory provision in Missouri makes the contract entered into by the parties invalid. The decision of the court below by invalidating part of the contract abrogates the obligation of contracts.

Appellee's Brief (p. 12).

F. The statute is not unconstitutional as an impairment of the obligation of contract.

Appellee argues that the constitutional protection of the obligation of contracts is necessarily subject to the police power, and therefore a statute passed in the legitimate exercise of the police power will be upheld although it may destroy existing contract rights. (Again appellee begs the question by assuming that which is to be proved, namely, that the exercise of the police power is legitimate, has been proved.) It goes further to state that the law was in effect at the time the contract was entered into and hence necessarily was included in the contract. This would be true only if it were a valid law and only if the provisions of it were equally binding on both parties. Under the Fair Labor Standards Act or other types of labor legislation, an employee could not contractually agree to work for less than the minimum 75¢ per hour and thereby relieve the employer from criminal or civil liability. In this case the employee could contractually agree to not take the allotted time off to vote and receive double time therefor, or he could simply refuse to avail himself of the opportunity, and the employer would not be guilty of a violation of the statute. There is a vast distinction between the sanctions imposed in labor legislation and in the statute here in question, which of course is not labor legislation at all. Appellee fails to meet appellant's contention on this point in any respect.

Appellant's Brief (p. 48).

E. Decisions in other states.

This is dealt with to a limited extent by appellee in its brief on page 24. It is interesting to note that prior to the Missouri decision this question had been passed on by courts

in four different states. The courts of last resort of the States of Kentucky and Illinois have held similar statutes unconstitutional. The appellee contends somewhat vapidly that the State of Illinois would not reach the same conclusion today. It bases this contention on the fact that the statute has been re-enacted by the legislature from time to time. As pointed out by Judge Vandeventer in his dissent in the Missouri case (R. 59), the fact that the statute has been re-enacted and maintained on the statute books does not make it constitutional, nor does the fact that it was passed over 50 years ago and there are no decisions on it attempting to prove its constitutionality. "More likely it proves that there has never been any attempt to enforce it."

Zelney v. Murphy, 56 N. E. (2d) 754, 387 Ill. 492, relied on by the appellee to show the changed attitude of the Illinois Court, does no such thing. The Illinois Court simply refuses to confuse the Illinois Corrupt Practices in Election Act with labor legislation. It is unfortunate that appellee has not avoided the same confusion.

Then the editor of C. C. H. Labor Law Journal and an unsigned article in the Columbia Law Review are taken by appellee as authority that the Supreme Court of Illinois would now change its holding. Of course, the Columbia Law Review article indulges in the same fallacy as does appellee. It is noted that the Columbia Law Review article (Appellee's Brief 35) starts off: "The problem of pay while voting should be considered against its proper background of constitutional decisions **in the field of labor legislation.**" (Emphasis supplied.)

The Missouri Supreme Court upheld the present statute when it was attacked under the provisions of Section 23, Article 2, Missouri Constitution for 1945, providing that no bill shall contain more than one subject which shall be clearly expressed in its title, as a law passed to prevent corrupt practices in elections.

The Columbia Law Review article makes interesting reading. It cites the West Coast Hotel Co. case, but fails to recognize the court's reasoning in that case wherein it overruled the Adkins case because of changed economic conditions. The article does not point up the difference in the economic condition of the employee now and fifty years ago, which this Court under the West Coast Hotel Co. doctrine must do. It finds a marked similarity between this type of legislation and minimum wage legislation. It does concede, "The chief differences are in the purposes of the legislation, and the requirement of payment for a period in which the employee performs no services," but the anonymous law school student from Columbia University thereafter forgets all about the difference in the purpose of the legislation. It states further in the article, "Some democratic countries have even gone so far as to make the casting of a ballot a legal duty." (See appellant's brief, page 18.) This statute seeks no such purpose. It seeks pay for one segment of the voters for being absent from work.

The article continues, "An extremely strong presumption operates in favor of the constitutionality of statutes regulating economic matters." The statute here scrutinized is to prevent corrupt practices in election, not to regulate economic matters. It even ends on that same note, "The present reluctance of the courts to substitute their judgment **in the economic realm** points the way to the constitutionality of pay while voting statutes." (Emphasis supplied.)

The decision of the Court of Appeals of Kentucky, which is Kentucky's court of last resort, is brushed aside by the appellee stating that the Kentucky court based its decision on the Illinois case which has since been repudiated by the Illinois Supreme Court.

There are decisions of courts in California and New York which appellee strongly contends are controlling. It is

interesting to note that the New York cases are by the Appellate Division of the Supreme Court of New York and not by the Court of Appeals of New York, which is New York's court of last resort, and that the Appellate Division of the Supreme Court does not have the jurisdictional authority granted by the New York Constitution to determine constitutional matters.

In Lee v. Ideal Roller & Manufacturing Co., 92 N. Y. S. (2d) 26 (admitted by the appellee as not considering the constitutionality of the New York statute), the New York court fell in the time-worn pitfall, "Section 226 of the Election Law was enacted to protect the earning capacity of employees . . ." (Appellee's Brief 29), but the Missouri Court has said the statute here questioned was enacted to prevent corrupt practices in election. Appellee quite disregards Judge Vandeventer's analysis of the two California cases which, incidentally, were not only not in point, but which were decisions by the Appellate Department of the Superior Court of the City of San Francisco. These decisions can be no final authority on the constitutionality of any California statute.

Appellee also chooses to leave unanswered Judge Vandeventer's analysis of the two New York cases where he states concerning The People v. Ford Motor Company, supra, "The majority opinion did not discuss the constitutionality of the statutes" (R. 62). Judge Vandeventer clearly distinguishes the California and New York cases from the case at bar. It might be noted in passing that the New York law and the California law both provide for a period of only two hours, provide that the employee must actually vote (New York directly, California impliedly), and apply only to general elections in New York (there is a special rule for primary elections) and for general elections, direct primary elections and presidential primary elections only in California. The Missouri statute provides for four hours, the employee does not have to vote, or even

be entitled to, and it applies to every election from road overseer to the President.

The New York and California statutes would appear to attempt a much more reasonable exercise of police power. Appellant does not concede that the New York or California statutes are constitutional, but calls the Court's attention to the distinction between the California-New York statutes and the Missouri statute. Even appellee admits its newly invented exercise of police power must be reasonable under the circumstances.

At the end of its Brief, appellee (p. 37) included excerpts from the Findings of Fact and Conclusions of Law of a district judge's holding in a Minnesota county. The statute is not set out; the facts are not set out; so it is impossible to apply those facts to the instant case. The Minnesota statute obviously differs widely from the Missouri statute in that the Minnesota statute sets no definite length of time and provides the hours shall be "during the forenoon." Even the District Court in Minnesota, which, of course, is not a final authority on the constitutionality of any statute, in an ambiguous manner determined that the employee was entitled to pay only for "such period of time during the said forenoon that they reasonably and necessarily heeded for said purpose" (Appellee's Brief 38). It required that such absence from work be "for the purpose of voting," and there is no showing as to whether the employees in question were paid by the hour, the day, the week or the month. The Minnesota case represents a frantic grasping at straws.

B. FURTHER OMISSIONS OF APPELLEE.

In addition to the arguments of appellant that appellee has sidestepped, misconstrued or failed to answer, as previously pointed out, there are a number of other arguments advanced in appellant's brief concerning which appellee is

strangely and significantly silent. Appellant throughout has requested that appellee explain how the right to vote is synonymous with the right to be absent on election day with pay. Appellant has sought in vain an answer to its query as to why a burden should be placed on one segment of the electorate to the benefit of another segment of the electorate. Appellant has queried as to whether hourly paid employees did not have an equal obligation and duty to vote on their own time, or without compensation, the same as other voters. Appellant has exposed the immorality of the demands made by the Union and sustained by the Missouri court. Appellant has shown there no longer exists an employer domination; that unions of hourly paid workers stand peerlessly in the economic and industrial field. Appellant has deplored their attempt to secure an economic advantage in a political field where their voice is already strident and clear. Appellant has decried this attempted departure from the accepted American tradition.

To none of these has appellee returned an answer. It has shown at no time why the right to vote means the right to be paid for being absent, why hourly paid employees have the right to demand and receive pay in violation of the Union contract for being absent on election day, whether the employee is entitled to vote or does vote. It is not asserted that in the light of present-day conditions the evil employer can brow-beat his sweaty employee. It has not denied the immorality of the concept inherent in this legislation. It has wilfully disregarded the effect of the moral disintegration that will be occasioned if this statute is upheld. It has not rejected the charge that the hourly paid employees, or at least a militant minority thereof, are attempting unconstitutionally and in violation of all ethical standards to obtain something for nothing.

II.

THE BRIEF OF THE AMERICAN FEDERATION OF LABOR, AMICUS CURIAE.

On proper request to the parties in this matter, consent was willingly given to the American Federation of Labor to file a brief as Amicus Curiae in this cause.

As this great Labor Union has stated on page 1 of its brief: "Its interest lies in the fact that it represents hundreds of thousands of employees who are the **beneficiaries** of laws in the State of Missouri. . . . ." (Emphasis supplied.) This opening statement unwittingly admits more than any argument appellant could make—the inherent unconstitutionality of the statute here in question. The A. F. of L. represents "the beneficiaries" of the laws in the State of Missouri. This is the underlying objection of appellant in this matter. The hundreds of thousands of employees represented by the A. F. of L. have as vital an investment in their country's institutions as any other group of the electorate. It is immoral for them to seek to be the beneficiaries of a law that would pay them for absenting themselves from work on election day. It is this frank subsidization that appears such a far cry from our concept of free and open elections.

Apparently the A. F. of L. does not understand the feeling of the Kentucky judge when it says (page 9):

> "From a careful reading of the opinion (i. e., the Illinois Central Railroad v. Kentucky) the decision appears to rest on the court's personal distaste for the law. It was condemned thusly: 'It does not seem to be in keeping with the American tradition.' The court treated the penalties for pay deduction as a provision for pay for voting and found this highly offensive."

The brief of the A. F. of L. does not show how the penalties for pay deduction are not provision for pay for voting

nor does it seem to think that such a provision would be highly offensive. The Court will remember that under the Missouri statute the employee not only may not vote but may not be entitled to vote. The A. F. of L. does not deny that such a statute is not in keeping with the American tradition.

On page 2 of its brief, the A. F. of L. mistakenly states that the validity of the statute under the Fourteenth Amendment is concerned with only two questions: (A) Is the promotion of a full exercise of the right of suffrage a proper concern of the legislature in that the interest of the public requires such promotion, and (B) Were the means adopted by the legislature reasonably necessary for the accomplishment of that purpose? In answer to the first question it states that it is desirable for as large a percentage of the electorate as possible to vote. There can be no question about this, but it is submitted that the means chosen by the legislature to carry out the plan does not promote the end sought. It overlooks the hourly paid working man's interest in good government and every other argument advanced by the appellant. It then decides that the means adopted were reasonably necessary. It continues that to determine the reasonableness it is necessary to view the circumstances existing at the time of the passage of the statute (page 3) and says: "Any other rule than this, such as determining the reasonableness of the statute by presently existing conditions, would require the court to sit as an arbiter on changing social trends."

The A. F. of L. then finds that what it calls the Lochner-Adair-Adkins cases to be no longer the ruling law, but if this Court were to apply solely the circumstances existing at the time of the passage of the statute it would have to also apply the state of the law as enunciated by this court sitting at the time of the passage of the statute, which both appellee and the A. F. of L. concede would

have found this statute unconstitutional without any more ado.

The A. F. of L. contends that the West Coast Hotel Co. case is being controlling and quite forgets that case in overruling the Adkins case considered the legislation in light of "the economic conditions that had supervened" since its ruling in the Adkins case. Maybe the court was not sitting there as an arbiter on changing social trends, but such a conclusion is hard to escape.

Particularly interesting is the A. F. of L.'s argument found on pages 8 and 9 of its brief when it applauds the Illinois Supreme Court's being "properly responsive to the constitutional times" and cites with approval from Zelney v. Murphy, where apparently the Supreme Court of Illinois is sitting as an arbiter on changing social trends:

> "These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The growing complexity of our economic interests has inevitably led to an increased use of regulatory measures in order to protect the individual so that the public good is reassured by safeguarding the economic structure upon which the good of all depends."

As pointed out before, the Murphy case was labor legislation, and the Illinois court properly recognized the rule would be and should be different from the voting statute. It concluded that the cases involving pay while voting could not be controlling in the consideration of a statute involving workmen's compensation. But the A. F. of L. highly approves its taking cognizance of the "growing complexity of our economic interests." Under either situation the statute cannot be constitutional. If it had

been tested at the time it was passed in the light of economic conditions existing then and of the trend of the courts then, it would be held unconstitutional. If it be considered in the light of present conditions, which the West Coast Hotel Co. case indicates is the proper rule, no necessity and no reasonableness has been shown for its being upheld. Hourly paid employees or any other employees are no longer subservient to the whims or oppressions of their employers. Neither appellee or the A. F. of L. has proclaimed any economic necessity existing at the present time.

The brief then continues on page 4 with statistics about the number of hours per week worked by employees throughout the United States, in Missouri and in Kansas. It does not show how many of these were hourly paid workers or how many were paid by the day, week or month who would suffer a deduction of wages if they were docked for the time taken to vote. The figures are meaningless without such a distinction. Appellant has never contended that an employee paid by the month could be or should be docked for the time necessary taken to vote. It has violently contended that a man who has entered into a contract to work an hour for each hour he is paid cannot constitutionally receive payment for whimsical absence from work on election day. The A. F. of L. sees fit to indulge in the wildest speculation: "... It was perhaps not unheard of for an employer to require its employees to work extra hours for the very purpose of defeating that right." An employer today would have no such power, and the A. F. of L. does not even contend that the employer would or could, under present-day existing circumstances, do such a fanciful thing.

The brief next turns its attention to the economic burden. The reasoning is a little hard to follow. Pages 4 and 5 of the A. F. of L.'s brief reads as follows:

"Even where the length of his working day was not such as to physically interfere with the right to vote, a working man heavily dependent upon his earnings to support his family could ill afford a deduction in pay for any reason. Confronted with a choice of refraining from voting or bringing home a smaller paycheck, many workingmen would stay at their jobs."

The A. F. of L. first assumes that the length of his working day would not physically interfere with the right to vote and then says that because he couldn't afford the loss of pay he would not vote. It is hard to see how, if he has time to vote aside from his working day, he can justify not voting because he doesn't want to take the time off from his job to vote and thereby lose the pay. The A. F. of L. quite overlooks the fact that the choice is not simply a choice between refraining from voting or bringing home a smaller pay check, but there is a third alternative that the working man can vote on his own time. Grotemeyer not only could have, but did vote on his own time. Still he wanted pay to campaign and to get out the vote.

The brief has pointed out very clearly on page 6 that an employee who absented himself twice for a four hour period (four hours absence from work would not conceivably be necessary) would still be gone no more than twenty-five hundredths of one per cent of his annual working time. This, of course, would mean that his annual pay check would be diminished no more than twenty-five hundreths of one per cent, but appellee and the A. F. of L. would insist that the employer should reimburse the employee for this twenty-five hundredths of one per cent. Does the A. F. of L. mean to imply that the working man's stake in his government is not worth twenty-five hundredths of one per cent of his income; that the working man will not vote unless the employer reimburses him

for this "infinitesimal amount," whether he needs the time or not? We cannot believe that the A. F. of L. believes this.

Continuing on page 7, the brief reads: "When a small pecuniary deprivation of the employer is placed alongside the public interest to be served by a full and complete electoral process, it becomes even clearer that the legislative action was reasonable in every respect." Appellee and the A. F. of L. carefully refrain from admitting any duty rests upon the hourly paid employee to vote. Neither has once shown why this burden of good citizenship should be borne entirely by the employer and none by his employee. They speak of "public interest" and "public welfare." Are these not vital to Frederick C. Grotemeyer or any of the hundreds of thousand of employees represented by the A. F. of L.?

Under any circumstances the employer suffers a financial loss when employees are not at work, namely, a heavy production loss. This was shown to be $7,138.00 as far as appellant was concerned (R. 11). This $7,138.00 production loss did not include the additional loss to the company of $951.42 demanded to be paid as wages for work not done. This production loss cannot be avoided. The unrighteous compensation to employees in violation of a contract usually regarded by a Labor Union as sacred can be avoided. Payment for time not needed or not utilized should not be pressed down upon the brow of the employer. The dignity of the working man should not be crucified upon the cross of this legislation.

III.

CONCLUSION.

Appellant mayhap has wearied the court with a seeming endless repetition of two or three points that it feels vital this Court should consider and discuss. Appellant desires

to be sure that these points are not disregarded as appellee and the Missouri Court have disregarded them. Appellant would be remorseful if, through a faulty presentation, the Court did not have an opportunity to consider fully these matters which appellant feels so strongly are determinative in this cause. The question of the morality of the statute, the question of why the right to vote is synonymous with the right to be paid for being absent from work on election day, the question of why one segment of the electorate should subsidize another segment of the electorate when all voters are similarly situated, and the question of whether an hourly paid employee does not have an equal interest in his country's welfare, have all been unanswered by the State. Half answers and evasive answers have been presented to a great many other questions.

Appellant feels that when this Honorable Court has fully considered the questions herein presented it will declare that appellant is entitled to the relief in this cause prayed for in its petition for appeal, namely, a reversal of the decision of the Supreme Court of Missouri.

Respectfully submitted,

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